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# Lawfinding, duality and irrationality: Rethinking trial by ordeal in Weber's *Economy and Society*

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*In Economy and Society Weber presents trial by ordeal as being the archetype of formal irrationality. Drawing on illustrations of ordeal from the ancient Near East to the present day, this article critiques Weber and argues that a more nuanced understanding of the operation of ordeal reveals flaws and inconsistencies in Weber's understanding of the ordeal, and consequently his classification of the phenomenon as being formally irrational. Ordeal is also a phenomenon of duality; the first aspect of human and magico-religious judges works with power dramas and sleight of hand to conceal the bias of a lawfinding judge in a multiplex society. The second duality of nature bridges what participants in the ordeal believe is happening and its operation in practice. This means that ordeal cannot readily be categorised as being formally irrational as Weber claims and instead bridges both formal irrationality and substantive irrationality.*

*Keywords: Weber, ordeal, oracle, rationality, irrationality, lawfinding, arbitrariness*

## Introduction

The phenomenon of trial by ordeal has been observed across many cultures and eras from the oldest known law codes found in the ancient Near East, across medieval Europe and in parts of Africa throughout the twentieth century and into the present day. In *Economy and Society*, Weber presents the trial by ordeal as being the epitome of formal irrationality. There are however inherent contradictions in Weber's presentation of the ordeal in *Economy and Society*; firstly, Weber claims that where a society lacks the machinery of government and state, the role of ritual and belief in witchcraft or other magico-religious<sup>1</sup> forces emerges as enforcing respect for social ties which have no sanction from the state to uphold them. On the face of it, this suggests that Weber does not envisage a situation where belief in magico-religious forces co-exists with a state both sufficiently developed and powerful enough to enforce not only respect for social ties, but for written laws. However, elsewhere in *Economy and Society*, Weber acknowledges that this combination can co-exist and cites, amongst other examples, ancient Babylonia and the Laws of Hammurabi as an illustration of this, though he does not offer an explanation of how or why this apparent duality might work. In this article, I take a closer look at the Laws of Hammurabi to illustrate how such a dualist system could operate in practice, arguing that even where a society has a relatively well-developed formalised legal processes and officials to implement it there are still circumstances when the formally irrational trial by ordeal is necessary to reach a resolution.

Secondly, in his analysis of law prophets and folk justice in relation to the medieval Germanic tribes, Weber claims that the 'judge' in the case, by whom the court was convened and held, did not participate in the lawfinding as his office 'did not confer upon him the charismatic quality of legal wisdom.'<sup>2</sup> Later, towards the end of *Economy and Society*, Weber appears to contradict this when he contrasts rational

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<sup>1</sup> Weber describes the forces to whom the question of guilt or innocence is put as 'magical powers' but Hoebel's (E Adamson Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (Harvard University Press, Cambridge 2006) terminology 'magico-religious' is preferable as, for example, against the Christian backdrop of the European ordeal material, there was a distinct religious element to the use of the ordeal; it seems doubtful that, say, the originators of the witch trials who perceived the use of magic as being illegitimate, associated with the devil, and negative in force, would have conflated it with what they viewed as the legitimate acts of their God.

<sup>2</sup> Max Weber (eds Guether Roth and Claus Wittich) *Economy and Society* (University of California Press, 1978) 768

adjudication on the basis of rigorously formal legal concepts contrasts with adjudication which is guided primarily by sacred traditions. In adjudication of this latter type, cases are decided either as charismatic justice or as khadi justice non-formalistically. Here, Weber uses “revelations” of an oracle, a prophets doom, or an ordeal<sup>3</sup> as examples of charismatic justice. This is not the case in relation to all trials by ordeal and it is to misunderstand the nature of the ordeal to assign it to the same class as oracle. In a trial by ordeal, an appeal to a magico-religious force is made where it is believed that a decision in a case may not be made by purely human means. Oracle relies on a human - perhaps a charismatically qualified sage - being not just a facilitator but also in overtly interpreting and declaring the decision or law from whatever signs or symbols emanate from the magico-religious force to whom the appeal has been made.<sup>4</sup> In contrast, though the ordeal may also rely on the charismatically qualified sage or priest, the overt part of their role is as a facilitator but the decision is ostensibly made conclusively by magico-religious forces and apparently - though I shall return to how accurate an understanding this is in practice later - with no interpretation or declaration of law being necessary from the facilitator. In not recognising the difference between an oracle and an ordeal, Weber fails to recognise that the role of ‘judge’ (in Weber’s sense of being the individual by whom the court or trial was convened and held) in a trial by ordeal cannot necessarily be reduced to this aspect alone and in fact ordeal requires concealed adjudication by a charismatic judge who is not overtly lawfinding. This is not true in all cases; in some trials by ordeal the outcome may be viewed as essentially random, or to use Weber’s terminology, ‘arbitrary’, with the judge acting as facilitator alone according to Weber’s understanding. It is not however accurate to state this of all types of trial by ordeal and in many circumstances the judge will in fact occupy a lawfinding role, though I argue in this article that the nature and extent of this may be concealed through the framing of the ordeal in ritual functioning as a power drama.

Whether the judge is lawfinding or not is crucial in determining whether the trial by ordeal in question can accurately be described as formally irrational according to Weber’s categorisation of the ordeal, as opposed to having more in common with substantive irrationality or khadi justice. I offer a solution to the problem Weber identifies that where a decision is of concern to a layman, instead of a lawfinding judge who solely occupies this role, the decision becomes less objective and will take into account the parties involved and the situation at hand. It will be difficult, if not impossible, for a judge who does not solely occupy this role to disregard a charge of bias; this is why the ordeal itself and particularly the ritual which frames ordeals is essential to minimise the appearance of bias where a judge is lawfinding. On this basis, although it appears that the ordeal may have more in common with substantively irrational khadi justice than being formally irrational in the way Weber understands it, the duality of the ordeal means that matters are not this straightforward. Although in practice it is the human judge that is actually lawfinding, this is not what the participants believe is occurring; the internal perspective of the participant has the human judge acting in an administrative capacity only, with the lawfinding aspect being carried out by the magico-religious force. There is in this way a dual aspect to the ordeal and whether one views it as an insider or an outsider will strongly affect how and where the ordeal may be placed within Weber’s typologies. I conclude that Weber’s understanding of the ordeal as being formally irrational is based on an understanding of ordeal inadvertently drawn from a participant perspective; the consequence of this is that Weber’s typology of the ordeal as the archetype of formal irrationality does not acknowledge the operating reality of the ordeal. Instead, this duality of ordeal means that it bridges both formal irrationality and substantive irrationality.

### **Trial by ordeal in Weber’s *Economy and Society***

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<sup>3</sup> Ibid 976

<sup>4</sup> see for example: David Zeitlyn ‘Spiders in and out of Court, or, ‘The Long Legs of the Law’: Styles of Spider Divination in Their Sociological Contexts’ in *Africa: Journal of the International African Institute*, vol 63(2) (1993) 219; Walter Farber ‘Witchcraft, Magic and Divination in Ancient Mesopotamia’, in *Civilizations of the Ancient Near East* (vol III) ed. Jack Sasson (Charles Scribner’s Sons, 1995); Bernard Jackson ‘Evolution and Foreign Influence in Ancient Law’ in the *American Journal of Comparative Law* 16 (1968) 373

The two most basic activities in law are creating law and, once created, finding it. In *Economy and Society*, Weber establishes two methodological categories of rationality and irrationality, each of which can be either formal or substantive in nature. For Weber, all formal law is, formally at least, relatively rational; law is however only 'formal' when, in both substantive and procedural matters, only unambiguous facts of the case are taken into account. Lawmaking and lawfinding will be formally rational where legally relevant facts are determined through a process of logical interpretation, and as fixed legal concepts are created and applied in the form of strictly abstract rules. Irrationality will arise where lawfinding and lawmaking are not guided by general rules or logic, with substantive irrationality existing where a decision is influenced by 'concrete factors of a particular case as evaluated upon an ethical, emotional, or political basis rather than by general norms',<sup>5</sup> This is typified by what Weber calls 'khadi justice'.<sup>6</sup> Where oracle or ordeals feature as a trial procedure, Weber views these as 'having originated in conciliatory proceedings between kinship groups'<sup>7</sup> and categorises them as being formally irrational in nature. Weber does not mean that the decision will be entirely irrational, as some stabilisation and stereotyping will occur where the decision becomes the subject matter of discussion, or when rational grounds for the decision are otherwise sought or presupposed.<sup>8</sup> In claiming that logical or rational grounds for a decision are lacking where a verdict is reached through magico-religious means of proof, Weber is however placing a value on a single particular type of rationality or rationalisation which does not however equate to the outcome of the ordeal being random and therefore lacking in rationality in the sense that the quality of reasoning has not been applied in the making of it. For Weber, nonformal justice occurs where there is a likelihood of 'absolute arbitrariness and subjectivistic instability';<sup>9</sup> in relation to trials by ordeal or use of oracles this does suggest that Weber believes the outcome to be apparently arbitrary (though this article will later cast doubt on Weber's typology of the ordeal as being formally irrational by arguing that the outcome of all ordeals is not truly arbitrary or random), though the process whereby the accused person was obliged to undergo the ordeal was not in and of itself arbitrary.

Weber explains the end of the ordeal by arguing that, as the authority of princes and magistrates increased in force, greater use of administrative officials resulted in legal procedure becoming increasingly rational in both form and substance. Eventually irrational forms of procedure were eliminated and the substantive law was systemised; in Europe, this process occurred in the 'procedural innovations of the English Kings and the Lords Chancellor, or in the inquisitorial procedure of the Catholic Church.'<sup>10</sup> This is broadly reflected in the passage of the European ordeal: the official sanctioning of the use of the ordeal is ended by the Lateran Council in the same year that the Magna Carta is signed; equally, in the apparent revival of the ordeal in Europe during the the Early Modern period, the operation of the Inquisition and eventual move towards adversarial trial is evident. The replacement of formally irrational proofs like ordeal with the apparently superior formal rational modes of proof was however not always linear; ordeal was sometimes simply replaced by compurgation and placed greater discretionary power into the hands of judges.<sup>11</sup> That the end of the ordeal was not as simple as this is clear from the extent to which a dualist system operated in ancient Babylonia. To an extent, Weber acknowledges this when he writes that

'these rationalizing tendencies were not part of an articular and unambiguous policy on the part of the wielders of power; they were rather driven in this direction by the needs of their own rational administration...Where these interests were absent the secularization of law and the

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<sup>5</sup> Weber (n 2) 656

<sup>6</sup> Ibid 795

<sup>7</sup> Ibid 812

<sup>8</sup> Ibid 759

<sup>9</sup> Ibid 813

<sup>10</sup> Ibid 809

<sup>11</sup> Robert Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (Clarendon Press, 1986) 137

growth of a specialized, strictly formal, mode of juridical thought either remained in an incipient stage or was even positively counteracted.’<sup>12</sup>

Weber views the period in which the ordeal operates as being a time when there is as yet no distinction between questions of law and questions of fact, though the matter of exactly what question was to be addressed to the magico-religious forces arguably represents the first stage in the development of technical-legal concepts.<sup>13</sup> In terms of the societies using trial by ordeal, which ranges from the oldest known law codes of the ancient Near East to present-day Liberia, Weber views them as being essentially ‘carriers of legal development’ and ‘...their aim is not that of achieving that highest degree of juridical precision which would maximize the chances for the correct prediction of legal consequences and for the rational systematization of law and procedure.’<sup>14</sup> Weber’s claim that the ordeal operates when there is no distinction between questions of law and questions of fact is nonetheless problematic on a number of levels as he appears to be presupposing that formal rationality and the formal irrationality of the trial by ordeal cannot simultaneously co-exist, when this is not in fact the case. This issue is not restricted to the ordeal; although Weber did not intend his typologies to be rigid categories, this is in some respects similar to the common law or ‘England problem’ and highlights the extent to which the boundaries of Weber’s typologies do not always, or even readily, match up to the operating reality. Weber, to an extent, acknowledges this apparent inconsistency in *Economy and Society*, referring to the Babylonian Laws of Hammurabi both directly<sup>15</sup> and indirectly<sup>16</sup> to illustrate a dualistic system where modes of ‘legal prophecy’ exist alongside a civilisation with an otherwise highly rationalised political and economic structure.<sup>17</sup> Babylonia is, in some respects, a curious choice for Weber to select to illustrate his analysis as in doing so he undermines the integrity of his own typologies and the drive towards formal rationality as a marker of social progress. In acknowledging that a dualistic system of the type found in Babylonia can exist, and coupled with the England problem, this serves to underscore further the extent to which Weber’s typologies can feel, at times, rather forced when considering societies or legal systems which do not readily fit within the categories, particularly non-Western, non-capitalistic societies. Returning however to the question of how or why a dualist system such as that found in Babylonia might operate, the key to understanding this apparent inconsistency lies in the types of offence which, in systems which otherwise demonstrate a degree of rationalisation, are resolved through recourse to trial by ordeal or other modes of oracular proof. These offences tend to be those where the nature of the offence means that obtaining evidence or eyewitnesses is difficult or impossible. Communities where trial by ordeal is frequently employed it as a means of legal decision-making in relation to accusations of the illegitimate use of magic or sorcery and adultery. A closer look at the Laws of Hammurabi also further supports the idea that the dividing line between modes of legal prophecy and an otherwise rationalised system are not so easily drawn as Weber imagines.

### **Trial by ordeal in the Laws of Hammurabi**

Babylonia was an empire state which existed in the region of Mesopotamia, occupying the area of land between the rivers Tigris and Euphrates which is, in the main, modern-day Iraq. The collection known as the Laws of Hammurabi (LH) was discovered and deciphered at the start of the 20<sup>th</sup> century and dates from around 1750 BCE. Containing about 280 stipulations; an epilogue containing a statement from the sixth Babylonian king, Hammurabi, suggests that these stipulations formed at least part of the law of the land:<sup>18</sup>

In order that the mighty not wrong the weak, to provide just ways for the waif and the widow,  
I have inscribed my precious pronouncements upon my stela...Let any wronged man who has

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<sup>12</sup> Weber (n 2) 809

<sup>13</sup> Ibid 764

<sup>14</sup> Ibid 809

<sup>15</sup> Ibid 851

<sup>16</sup> Ibid 769

<sup>17</sup> Ibid 769

<sup>18</sup> Bruce Wells ‘Law and Practice’ in *A Companion to the Ancient Near East* ed. D Snell (Blackwell, 2005) 184

a lawsuit come before the statute of me, the king of justice, and let him have my inscribed stela read aloud to him, thus may he hear my precious pronouncements and let my stela reveal the lawsuit for him...May any king who will appear in the land in the future observe the pronouncements of justice that I inscribed upon my stela. May he not alter the judgments I rendered and the verdicts that I gave...<sup>19</sup>

For Weber, an order will be called 'law' if it is externally guaranteed by the probability that coercion, whether physical or psychological, will be applied by a staff of people to bring about conformity or to avenge violation.<sup>20</sup> This 'staff' need not be of any kind that we would recognise in a modern legal system, and Weber cites the example of blood vengeance where the enforcement staff exists in the clan, provided that the reaction is determined by some sort of regulatory order. On the face of it, the Laws of Hammurabi look not dissimilar to the concepts of statute and precedent familiar to the modern lawyer, though consideration of the actual text of the collection suggests that the code alone would not have made particularly effective law: the collection cannot be thought of as comprehensive, omitting as it does a number of issues, including murder. Additionally, a certain amount of legal knowledge on the part of the reader is presumed, suggesting that a body of law apart from them existed and was known and used.<sup>21</sup> Although authority and legitimacy in ancient Babylonia was based upon divine mandate, the king's power was not absolute, but was (theoretically at least) subject to the rule of law. There was an expectation that the king would, in administering justice, balance the need to uphold traditional law (*kittum*) with a need to 'temper the harsh letter of the law with equity' (*misarum*).<sup>22</sup> Officials appointed by central administration dealt with many day to day matters, though correspondence between Hammurabi and his officials show that he frequently intervened, giving instructions on individual cases.<sup>23</sup> Though imperfect, there is a clear sense of a system with characteristics of formal rationality, laws and staff to administer them.

Trial by ordeal could take a number of different forms in ancient Babylonia; one account has the accused swimming a set distance, perhaps bearing a millstone, though, as in trial by battle in the medieval period, the use of substitutes was permitted. If a swimmer failed to complete the appointed task, or if he drowned, he lost the case by divine judgment.<sup>24</sup> LH 2 illustrates both the dualist system in evidence in Babylonia and also why such duality would be necessary; here the law concerns the case of an individual accused of sorcery, though it is mentioned in the Mari cuneiform letters as being applied also in cases of personal injury and theft.<sup>25</sup> Though it is not entirely clear what evidence to support a charge of sorcery might involve, LH 2 also indicates the outcome if the ordeal shows that the accusation was false:

In case a man accused another man of sorcery  
and has not substantiated (the charge)  
He who is accused of sorcery will go to the River  
He will plunge into the River<sup>26</sup>  
If the River will thereupon have grabbed him

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<sup>19</sup> Martha Roth, *Law Collections from Mesopotamia and Asia Minor* (Scholars Press, 1997) 134

<sup>20</sup> Weber (n 2) p5

<sup>21</sup> Wells (n 18) p185

<sup>22</sup> Raymond Westbrook (ed), *A History of Ancient Near Eastern Law* (Leiden, 2003) 364

<sup>23</sup> Ibid 365

<sup>24</sup> Durand, trans. from French in Westbrook (ibid) 375

<sup>25</sup> Ibid 376

<sup>26</sup> GR Driver and John Miles (*The Babylonian Laws vol. II* (Oxford at the Clarendon Press 1955) 63) prefer to transliterate 'River' as 'River-god' or 'holy river' on the basis that the supernatural force being appealed to in the ordeal is the river, rather than a separate deity, and that it is more accurate on this basis to describe the river as a holy river or river-god. The procedure is simple; where the accused is guilty he will sink (and shall either drown or be fished out for further punishment) and where innocent he will float. Though this initially appears to be a classic trial by cold water, very similar to the trial by cold water used in Europe in the medieval and early modern periods, the outcome as to guilt or innocence is apparently opposite. In Europe, were the accused to float, this was taken as an indication of guilt.

His accuser will take over his estate  
If the River has cleared the man,  
and he has come through safely  
the one who accused him of sorcery will be executed  
(and) the one who plunged into the river  
Will take over the estate of his accuser.<sup>27</sup>

In some ways, LH 2 exemplifies the contradictions inherent in the otherwise rationalised system in Babylonia and the extent to which Weber's categories can overlap in practice. Here is a pronouncement of law (or at least a codification of existing law) which does not look to the king or any of the lawfinding officials for judgment, but instead relies on what Weber would have seen as a mode of legal prophecy. Judges may be lawfinding in some instances and may carry out merely administrative roles in others, even within the same system; an illustration of this may be found in LH 129, which contains a provision concerning the punishment of those who have been caught committing adultery:

If any man's wife should be seized lying with another male, they shall bind them and cast them into the water; if the wife's master allows his wife to live, then the king shall allow his subject (the other male) to live.<sup>28</sup>

LH 129 concerns the simplest case which arises in relation to adultery; that of a woman caught *in flagrante* with her lover. There is no question of doubt as to the guilt of the parties and the law provides for a punishment, though this is not mandatory and may be mitigated by the cuckolded husband. Similar rules concerning punishment applied to other offences; for example, where a murder had been committed, the family of the victim could decide whether to accept monetary compensation instead of demanding the execution of the murderer; the role of the judge in such cases was not to participate in the process as lawfinder, but instead to ensure that the penalty did not outweigh the severity of the wrong, while allowing the victim to choose whether or not to mitigate the harshness of that penalty.<sup>29</sup> In more complex situations, such as where a woman had been accused of adultery but not caught in the act, the accused woman could clear herself by swearing an oath (LH 131); though under the provisions of LH 132 if she 'has a finger pointed against her'<sup>30</sup> she was obliged to undergo the river ordeal 'for her husband':<sup>31</sup>

A married woman:  
If the finger (of scandal) has been pointed against her  
Because of another man (but)  
She has not been caught in the act of lying with another man,  
For the sake of (and before?) her husband  
She shall plunge into the river

In relation to the provisions concerning adultery, the key difference between whether the accused was obliged to undergo a trial by ordeal seems to depend on the availability of witnesses, and this is where an explanation for the dualistic system becomes more clear. Where the adulterers envisaged by LH129 are caught *in flagrante*, so are either caught in public or witnessed by others meaning there is no question of fact or law to be placed before a lawfinding judge, this situates the outcome within the formalised justice system – the adulterers are bound and cast into water by way of punishment and the judge participates in a merely administrative role. Though the question of guilt or innocence of the

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<sup>27</sup> Transliteration in Tikva Frymer-Kensky, 'The judicial ordeal in the ancient Near East' (PhD thesis, Yale University 1977) 140

<sup>28</sup> Roth (n19) 105

<sup>29</sup> Wells (n 18) 193

<sup>30</sup> Frymer-Kensky interprets this as meaning that the matter has become the subject of public speculation and gossip, Frymer-Kensky (n 27) 151-2

<sup>31</sup> Westbrook (n 22) 418

accused is not at issue in this situation, it raises questions about bias and to what extent the roles of judge and lawfinder may be so easily disentangled in reality.

### Judges and lawfinding in trials by ordeal

Drawing on the practices of medieval Germanic law prophets and folk justice, Weber claims that the 'judge' in the case, by whom the court was convened and held, did not participate in the lawfinding as his office 'did not confer upon him the charismatic quality of legal wisdom.'<sup>32</sup> In separating the role of judge from lawfinding in this way, Weber firstly assumes that it is possible to do so, and secondly, that the outcome of a trial by ordeal is determined by something external to the process and those involved in it. This is arguably not the case in relation to all (or indeed even many) trials by ordeal and Weber fails to recognise that the role of 'judge' (in Weber's sense of the individual by whom the court or trial was convened and held) cannot be reduced to this essentially administrative aspect alone. In some trials by ordeal, the outcome may certainly be viewed as essentially random or arbitrary, with the judge acting as facilitator alone according to Weber's understanding. For example, in the Liberian sassywood ordeal, which involves drinking water infused with the poisonous bark of *Erythrophleum guineense*, the poison runs through the body of the imbibing accused looking for 'œ' (a neutral supernatural power, not necessarily evil, but in this context related to witchcraft). If no œ is found, then the sassywood will be purged from the body; if it is found, it will stop and the accused will collapse and die.<sup>33</sup> This of course assumes that the poison has not been manipulated at the preparation stage but, provided it has been prepared correctly, whether an individual is affected by the poison or not is apparently essentially arbitrary. In contrast, the relatively high level of acquittals in ordeals such as trial by hot iron which seem on the face of it impossible to complete unharmed, indicate opportunities for manipulation of either process or outcome by human hands, though how this was done is not necessarily obvious. Typically, in a trial by hot iron the accused person would be obliged to carry a piece of red-hot iron for a certain distance. The weight of the iron was determined by law and varied with the importance of the issue or magnitude of the alleged crime.<sup>34</sup> The iron would typically weigh 11lb and in the triple ordeal, 31b; the distance that the iron was required to be carried could range from nine to twelve paces. The administration of this ordeal followed two days of fasting on bread and water; the hand or foot was washed and was not then permitted to touch anything before it came into contact with the iron. After the trial, the limb would be bandaged until Saturday, when it was opened in the presence of the accuser and the judges,<sup>35</sup> who were not ostensibly lawfinding. One apparent disadvantage of this method, when compared to other ordeals such as poison ordeals or trial by cold water, was the lack of an immediate result; there was a three-day wait before the hand could be unbound for inspection – perhaps operating as a neutral period of waiting, for crowds to disperse and emotions to calm. Trial by hot iron could however have other problems, particularly where several criminals were to be examined together, as the same piece of iron would be used successively; this gives a clear advantage to the last person to undergo the test as the temperature of the iron is likely to be much lower than it was at first.<sup>36</sup>

This is problematic on a number of levels; in some respects it seems implausible that the majority of those present at this particular form of trial, whether as accused, judge (whether lawfinding or not) or spectator would be unaware that metal will cool once it is removed from fire.<sup>37</sup> Inquiries into the effect of picking up a pound, or even three pounds in the case of the triple ordeal, of red-hot iron initially suggest that this particular form of trial would be difficult, if not impossible to manipulate. Coming off the fire after half an hour, the iron would be around 500-800 degrees in temperature. Even taking into account the cooling period suggested by the form of the test, at the point when the prayer or invocation is said and the holy water sprinkled upon it, it seems likely that the iron must still have been at a very high temperature if observers were able to describe it as 'red hot' in appearance. This type of ordeal

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<sup>32</sup> Weber (n 2) 768

<sup>33</sup> Elizabeth Tonkin 'Autonomous Judges: African Ordeals as Dramas of Power' (2000) *Ethnos*, vol 65:3 367-8

<sup>34</sup> Henry Lea *Superstition and Force* (Blom, 1892) 287

<sup>35</sup> Ibid 288

<sup>36</sup> Ibid 288-9

<sup>37</sup> Ibid 298



seems difficult to manipulate to achieve a desired result though, given medieval standards of hygiene, it seems incredible that anyone was ever exonerated when this method was used. Despite this, going beyond the records of the eyre rolls and looking at Hungarian accounts from the early thirteenth century, the success rate was higher than might be expected; from 306 recorded ordeals, the accused passed in 210 of these cases.<sup>38</sup> Unconvincing explanations of how such a surprisingly high number of exonerations take the form of speculation about the Leidenfrost effect and how perspiration on the palms of the hands of the persons undergoing the ordeal replicate this effect.<sup>39</sup> Even if this were possible in practice, the prolonged period of time for which the accused was required to carry the iron, nine steps or more, would be likely to result in third degree burns. Three possible explanations are offered for the exoneration of so many; firstly that the innocent accused might genuinely be unharmed by the hot iron for reasons not yet understood; secondly, that a deep burn might have effectively cooked the hand, giving the appearance that it was uninjured; and finally that a visible infection had not developed by the time the wound was unwrapped on the third day.<sup>40</sup> None of these explanations is particularly appealing and do little to move away from Weber's understanding of the ordeal as being formally irrational in nature and, in so being, lacking a lawfinding judge. The first explanation seems unlikely and, similarly, it seems improbable that it was not known that badly burned flesh took on a 'cooked' appearance or that infection tended to develop after the third day, if indeed blood poisoning was what was being looked for. Many accounts of trial by ordeal lack detail as to what was being looked for when the hand was unbound or whether the iron might have been red-hot when removed from the fire but subsequently cooled to a less harmful temperature during the subsequent praying and ritual before the trial itself. In practice, to explain how such a high number of acquittals could have resulted from the trial by hot iron, the interpretation of the results must have been highly flexible to overcome these objections; consequently the efficacy of ordeal would seem to be highly dependent on the feelings of the group. It is clear that in these circumstances that the judge in the ordeal must occupy a lawfinding role, though I will argue later in this article that the nature and extent of this is concealed through the framing of the ordeal through the surrounding ritual functioning as a power drama. Whether the judge is lawfinding or not is crucial in determining whether the trial by ordeal in question may accurately be described as formally irrational according to Weber's categorisation of the ordeal in general, rather than having more in common with khadi justice and elements of being formally substantive in nature.

The use of what Weber calls 'legal prophecy', which includes the use of both the oracle and the ordeal as a legal decision-making tool, meant that individuals within a community such as priests or elders gained power and authority from their activities as dispensers of oracles or in their direction of the ordeal. In the undeveloped legal systems in which the ordeal operates, Hoebel considers that the authority gained under these circumstances is a relatively temporary thing with, for example, authority residing with the wronged individual and his immediate kinsmen but only for the time necessary to deal with the problem at hand. On other occasions, authority may be exercised by the community on its own behalf, for example in the form of lynch law. For Hoebel, this is 'not a backsliding from, or detouring around, established formal law as it is with use', but that it is a step towards the emergence of criminal law where the exercise of legal power has not yet been refined and allocated.<sup>41</sup> LH 129, which concerns the right of a cuckolded husband to determine the severity of punishment of his wife and the other man, illustrates this sense of an intermediate stage between the temporary authority of the wronged individual and the move towards the refinement and allocation of lawfinding powers. The king's role as lawfinder in this case was to ensure that the penalty did not outweigh the severity of the wrong, while allowing the victim to choose whether or not to mitigate the harshness of that penalty.<sup>42</sup> The problem for Weber is that where a decision is of concern to a layman, instead of a lawfinding judge who solely occupies this role, the decision becomes less objective and will take into account the parties involved and the

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<sup>38</sup> Janos Karacsonyi and Samu Borovsky (eds), *Regestrum Varadinense* (Budapest, 1903), in Margaret Kerr et al, 'Cold Water and Hot Iron: Trial by Ordeal in England' (1992) *Journal of Interdisciplinary History* 22(4) 589

<sup>39</sup> Rebecca Colman, 'Reason and Unreason in Early Medieval Law' (1974) *Journal of Interdisciplinary History*, IV:4 590; Kerr et al (ibid) 591-4

<sup>40</sup> Kerr et al (n 38) 591-4

<sup>41</sup> Hoebel (n 1) 281-2

<sup>42</sup> Wells (n 18) 193

situation at hand. It will be difficult, if not impossible, for a judge who does not solely occupy this role to disregard a charge of bias.

### The problem of bias

The problem of a lawfinding judge who does not solely occupy that role is considered by Gluckman within the context of typical traditional African judicial procedure. For Gluckman, this traditional judicial procedure is characterised by six key elements: simplicity and lack of formality; reliance on 'irrational' modes of proof and decision; the fact that the parties (and often the judges too, where they are used) are normally involved in complex or multiplex relationships outside the court-forum, relations which existed before and continue after the actual appearance in court, and which largely determine the form that a judicial hearing takes; a common-sense as opposed to legalistic approach to problem-solving; the underlying desire to promote reconciliation of the contesting parties, rather than merely to rule on the overt dispute which they have brought to court; and the role of religious or superstitious and ritual beliefs and practices in determining legal responsibility.<sup>43</sup> The effect of 'multiplex' relationships between people is a key factor in understanding tribal or customary law in context and, in turn, the trial by ordeal as a means of legal problem-solving. Multiplex relationships are those where the participants interact on a number of different levels and for a variety of purposes, as opposed to 'simplex' relationships, which are essentially single-interest.<sup>44</sup> But why should the type of relationship between the different parties affect the outcome of the dispute? It is inevitable that where there is a multiplex relationship, a disturbance in one aspect of the relationship is likely to affect the others adversely and so lead to the bias that Weber identifies. For example, in the rural or tribal contexts where multiplex relationships prevail, judges and litigants will almost certainly interact in relationships outside the courtroom or forum where the dispute is raised. Though they face each other in court today, they may have to collaborate in the same work-party tomorrow. In this context, courts and processes consequently tend to the reconciliatory in disputes and consider not only the facts of the immediate case, but the history of the relationship between the parties. Consequently, the notion of relevance is much broader than that seen in disputes which concern parties in a simplex relationship, but the risk of bias is correspondingly much higher than in single-interest relationships. This risk of bias does not mean that the problem at hand can be allowed to go unsolved: communal good, that is the general prosperity of the country/group as a whole, arises from individual prosperity through individual plots of land, animals, and women;<sup>45</sup> all of which may be the source of disputes which will in turn require resolution for the community to continue functioning cohesively. There is always, at some level, a conflict between these two aims as communal good will not always coincide with personal prosperity.

Trial by ordeal provides a solution, of sorts, to Weber's problem of bias in societies and situations where a judge, whether lawfinding or not, does not occupy a simplex role. That judges in such societies are unlikely to occupy simplex roles is implicit in Weber's analysis of when logical or rational grounds for a decision will be lacking: verdicts of 'a charismatically qualified sage...an elder steeped in tradition, or an elder of the kinship group, or an arbitrator selected *ad hoc*, or a permanently elected expounder of the law...or a judge appointed by a political ruler.'<sup>46</sup> Only the latter two categories could potentially occupy the role of judge in a simplex capacity. Weber's claims of bias are clearly well-founded, but having the authority of acting as a judge in addition to the other role or roles that an individual may occupy within a community does not necessarily lead to the tyranny or arbitrariness that might be expected in such a scenario; chiefs and elders must have followers, and these followers in turn impose limitations. This also relates to a certain level of consistency in adjudication, as it will be difficult for a judge to avoid the charge of bias where he has consciously disregarded a norm which he has used as his maxim in an earlier similar matter. The same considerations hold true for successive judges – the more stable the tradition, the more the judges will depend upon these maxims because it is then that every decision, regardless of how it came into existence, appears as being derived from the exclusively

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<sup>43</sup> Max Gluckman (ed.) *Ideas and Procedures in African Customary Law* (OUP, 1969) 22

<sup>44</sup> Jaap Van Velsen, 'Informality, Reconciliation and False Comparisons' in Gluckman (ibid) 138

<sup>45</sup> Gluckman (n 43) 19

<sup>46</sup> Weber (n 2) 762

and persistently correct tradition. Enduring power, that is, that which goes beyond the individual elder or charismatic sage, is always institutionalised; it is in effect transpersonalised.<sup>47</sup> Tradition and charisma can in this way interact to give an individual either an impersonal or personal legitimacy, and also place limits on the lawfulness of their acts.<sup>48</sup> This requires some explanation; in the societies where trial by ordeal or oracle operate it is not always clear that there is a legal or political institution operating as a driving force or specifically delegating power or authority to a priest or elder. Equally, though the priest or elder will often feature at the heart of the ordeal or oracular process in the role of judge as Weber describes, they are not usually overtly performing as lawfinder; a magico-religious force is the apparent source of the decision. The interface between the role of the human judge and the magico-religious lawfinder in a trial by ordeal is almost always surrounded by ritual and in this way the reality of that apparent interface is concealed.

### **The role of ritual**

The purpose of ritual in relation to trial by ordeal is two-fold, though interrelated; the first relates to mitigating the effects of Weber's charge of bias against judges in multiplex relationship situations. The second purpose relates to rituals functioning to label acts so there is no mistake as to their meaning and as dramas of power. The problem of bias for judges functioning in multiplex roles has been considered above, but the ritual aspect merits further examination here. Weber claims that it is difficult for a judge to avoid a charge of bias where he has consciously disregarded a norm which he has used as his maxim in an earlier similar matter. For Weber, the same considerations hold true for successive judges – the more stable the tradition, the more the judges will depend upon these maxims because it is then that every decision, regardless of how it came into existence, appears as being derived from the exclusively and persistently correct tradition.<sup>49</sup> In relation to trial by ordeal, the ordeal and the ritual surrounding it serve as a setting for the decision deriving from the lawfinding magico-religious source. In this sense, the trial by ordeal is not only a means of proof by also functions as a tradition or institution in from which decisions made in this way will draw their validity.

It is characteristic of compurgatory oaths and trials by ordeal that the relevant question is asked in the formally correct manner and, where it is not, the 'magical technique cannot provide the right answer':<sup>50</sup>

Primitive procedures for adjusting conflicts of interest between kinship groups are characterized by rigorously formalistic rules of evidence... These rules were at first influenced by magical beliefs that required that the questions of evidence should be asked in the proper way and by the proper party. Even afterwards it took a long time for procedure to develop the idea that a fact, as understood today, could be "established" by a rational procedure, particularly by the examination of witnesses, which is the most important method now, not to speak at all of circumstantial evidence.<sup>51</sup>

The formalistic rules and rituals surrounding ordeal plays a crucial role, not only in terms of belief, but in terms of practicalities where the judge cannot or does not function in an overtly lawfinding capacity. The ordeal therefore can present a means of finding a solution where judges cannot publicly take responsibility for lawfinding, something which Tonkin has compared to the development of the secret, inscrutable, decision of the jury trial which eventually developed.<sup>52</sup> Weber also makes a similar argument whereby the jury takes the place of the oracle and resembles it in so much as it does not indicate rational grounds for its decision.<sup>53</sup> The ordeal has a dual purpose here; the ritualistic nature of ordeals and oracles serves to ensure that both the accused person and the audience are aware that what

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<sup>47</sup> Hoebel (n 1) 277

<sup>48</sup> Weber (n 2) 764

<sup>49</sup> Ibid 759

<sup>50</sup> Ibid 761

<sup>51</sup> Ibid 811

<sup>52</sup> Tonkin (n 33) 377

<sup>53</sup> Weber (n 2) 763

is essentially a legal act with teeth that can bite is being carried out rather than mere vigilantism. Where the relationship between judge and accused is multiplex, as in the medieval or tribal communities where people are dependent upon each other for survival to a much greater extent than in a modern society, this may provide a motive for a decision-making being unwilling to take public responsibility for what may be an unpopular decision. It is not beyond the realms of possibility that an unpopular decision could have serious consequences for a decision-maker or his family, perhaps from kinfolk of the guilty party. In the context of a simplex relationship, the parties are likely to meet only as judge or decision maker and accused and neither they nor their kin would have any interaction, let alone interdependency. The participants therefore become actors in the ordeal as a drama - 'a performance with a plot' - loaded with symbolism and suspense as the resolution of the main issue ('Is he guilty or not?') was played out. The 'performance' of the ordeal is heavy on symbolism, both in terms of the elements involved and the location. Cleansing and purifying motifs of fire and water frequently form the basis of the ordeal in the ancient Near East and European ordeals but with some African ordeals, such as the sassywood ordeal, even the location was evocative. With the Liberian sassywood ordeal, although the judge is unlikely to be lawfinding as the outcome appears to be arbitrary, the location in which the ordeal took place was symbolically important; the trial must take place on the margins of the town - a dramatic balance between the society, laws and values that the town represented and the 'uncultivated "bush" where the guilty dead were thrown.'<sup>54</sup> In this way the ordeal is both a sleight of hand which conceals the true origin of the lawfinding decision and a highly persuasive immersive performance which engrosses both the actors and the audience; the verdict convinces because the audience believe they really see the outcome. Where an individual, though he may be acting as 'judge', is not overtly acting as a lawfinder, the use of trial by ordeal means that power is not in the hands of an individual representing an institution, but that the enduring power of the ordeal makes it an institution in its own right.

### **Arbitrariness and duality in trials by ordeal**

When lawfinding, judges are supposed to be 'unmoved by personal interests or the congeniality or otherwise of those who appear before them'; partiality is the introduction of private considerations into a judgment that should be made on public grounds.<sup>55</sup> Fairness and impartiality are important considerations not only in relation to judges and bureaucrats, but also in those contexts where the relationship is more personal. In terms of ordeals, and taken in conjunction with the idea that participants were engaged in multiplex relationships, this raises questions about the extent to which it was possible for human involvement in the ordeal to be impartial and not affected by personal knowledge and relationships and whether a lack of impartiality would necessarily have a negative effect. There is not a straightforward solution here, either in terms of understanding the operation of the ordeal or evaluating it; there are a number of advantages and disadvantages to both an arbitrary process and one which involves human agency. Arbitrary decision-making approaches neglect human need, ignores personal merit and desert, expose people to a high degree of risk and uncertainty and circumvent the processes of rational thought and deliberation.<sup>56</sup> These are general objections to arbitrary decision-making or the use of lotteries, but can the dispensation of justice not be considered to be an essential resource which must be dispensed even if there is no rational (in Weber's sense) means of doing so? For example, with regard to the allegation that lotteries neglect human need, this is going to depend on exactly how 'need' is defined. What if the 'need' of a particular society is that a decision be made in a difficult case which is important to the community so as to achieve closure but lacks a rational basis upon which to make a decision, such as witnesses or other evidence? This is clearly at odds with the need of the individual to achieve justice, which would ideally mean a correct decision, in their individual case. If we regard the formally rational process as the pinnacle of legal decision-making, the need of the individual accused of an offence may well be regarded as neglected where ordeal or oracle is resorted to as a mode of proof. However desirable a system which is formally rational may be, where this is not possible and in the context of the high level of interdependency in communities where the ordeal is used, the need for closure for the community as a whole in relation to certain issues

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<sup>54</sup> Tonkin (n 33) 378-9

<sup>55</sup> Brian Barry, *Justice as Impartiality* (Clarendon Press, 1995) 13

<sup>56</sup> Barbara Goodwin, *Justice by Lottery* (Harvester Wheatsheaf, 1992) 46-7

may need to take precedence over the need of the individual for their mutual survival and continued cohesion.

That arbitrary means of legal decision-making ignore personal merit and desert is a complex matter when it is considered in relation to justice and the ordeal and other oracular modes of proof. In relation to legal decision-making, ignoring personal merit and desert could mean avoidance of bias or where it refers to accessing a method of legal decision-making, it could be disadvantageous. The purpose of this article is not to consider whether bias ever has a positive role in the law generally, but considering the possible existence of the roles of merit and desert in relation to ordeal and oracle presents some questions. The concept of desert in particular is often conflated with another, distinction, though Goodwin believes that desert is the secondary parasitic concept of the two.<sup>57</sup> Hobbes and Rousseau reached their strongest conclusions on the basis that the desire for distinction and esteem is a primary human motivation and culturally deep-rooted, as is the apparent 'need to compare and evaluate others and to assess their merits or their desert.'<sup>58</sup> Rousseau believed this need arose through social living,<sup>59</sup> while Hobbes saw it simply as part of human nature.<sup>60</sup> In relation to the ordeal, oracle and the surrounding practices, it is evident that not only whether, but the *type* of ordeal to which the accused was obliged to submit was dependent upon the accused's status within the community. In medieval Europe, the number of compurgators varied depending upon the social standing of the accused; where the accused had few connections in the area he would not only be forced to undergo the ordeal as a mode of proof, but perhaps even the triple ordeal where an even heavier bar of hot iron was used. Amongst the Zande people, particular forms of oracle were reserved for those who could afford them or were of the appropriate status; *benge*, a poison oracle, was expensive and access to its use was not universal. *Benge* was controlled by older men from the community, who could place the names of younger men before the oracle to bring accusations of adultery against them. The use of the poison oracle can also be viewed as one of the principal means of male control, as women are not only debarred from being involved in the process but from speaking of it at all. When the prevalence of the poison oracle or *benge* in Zande life is considered, it is clear that though they may be accused and tested by this means, that not permitting women to access the mystical force of the poison oracle reinforces their inferior social position.<sup>61</sup> It was not only women who were excluded, and the consequences were not restricted to not being permitted to use *benge*; a man who could not afford the poison, and thus could not initiate any important undertaking, could not be considered an independent householder. For the men in this class their lesser status is emphasised by the inability to afford *benge* and a correlative inability to ascend the social hierarchy.

In terms of exposure to high degrees of risk or uncertainty for the participant in relation to the ordeal, this again depends upon how the ordeal is understood. If ordeal is the essentially arbitrary process, a true lottery, that Weber believes it to be then the accused person could certainly be at risk. Conversely, when the likelihood of a lawfinding judge participating in some types of ordeals is taken into account the level of risk or uncertainty is significantly diminished. Understanding ordeal in this way casts further doubt on Weber's understanding of the ordeal as being formally irrational. In an ordeal or oracle where the outcome is arbitrary, the accused person certainly runs the risk of an incorrect verdict, whether or not they are guilty, and in many cases irrespective of whether they believe magico-religious forces will intervene, but the same risk would appear to be present in a non-arbitrary, human-controlled ordeal. The difference is that in this latter situation, the ordeal moves away from being formally irrational and has more in common with khadi justice. It is therefore tempting to simply conclude that Weber's typology of the ordeal as being formally irrational is inaccurate and based on a flawed understanding of the ordeal, instead placing the ordeal in the category of substantive irrationality alongside khadi justice. This conclusion would however be premature; while it may have features in

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<sup>57</sup> Ibid 60

<sup>58</sup> Ibid 60

<sup>59</sup> Jean Jacques Rousseau, *A Dissertation on the Origin and Foundation of the Inequality of Mankind*, (trans. GDH Cole) (Dent, 1913) 197

<sup>60</sup> Thomas Hobbes (ed. CB Macpherson) *Leviathan* (Penguin, 1968) 162, 185

<sup>61</sup> EE Evans-Pritchard, *Witchcraft, Oracles and Magic among the Azande* (OUP, 1972) 283

common with the substantively irrational khadi justice, trial by ordeal has a significant point of difference which relates to its peculiar form. In a trial by ordeal, there is a double duality bound up in the judging as a consequence of the binary of what the participants think is taking place versus what is actually happening. In a trial by ordeal, while in practice there is one (human) judge who is not merely participating in the process in an administrative role and is in fact lawfinding, to those participating in the ordeal there are two judges: the human judge, performing an administrative role only, and the magico-religious judge who is ostensibly lawfinding in the ordeal. This latter is undoubtedly the perspective from which Weber's typology is drawn, where what the participants believe is happening is a formally irrational form of justice, whereas what is actually happening has more in common with substantively irrational khadi justice.

## Conclusions

Trial by ordeal is a phenomenon of duality and conflict between formality and irrationality, irrationality and substantiveness, appearances and reality, and is consequently far more complex than Weber's presentation and understanding of it in *Economy and Society*. Weber holds the rigorous formalism of the ordeal procedure in contrast to the irrational character of the technique of the decision. The formalistic rituals and power dramas which surround the ordeal are key to reinforcing the ordeal as an institution which is both legitimate and powerful, as well as distracting from the role of the single human lawfinding judge who is actually adjudicating and reducing the appearance of bias. This does not conclusively answer the question of whether the outcome of ordeals is, objectively speaking, 'correct' but there is a sense that the process by which decisions are reached can be considered more important than the overall quality of the decisions. In the sort of cases where the ordeal is employed as a mode of proof, it tends to be where a community is faced with an intractable problem; they seek not necessarily objectively correct answers but attributable 'answers for which somebody can be held responsible or accountable.'<sup>62</sup> Weber's characterisation of irrationality in *Economy and Society* is broad, extending from those situations where logical or rational grounds for a concrete decision are entirely lacking and discovered through magico-religious means of proof, but also where charismatically qualified sages, elders, ad hoc arbitrators or judges appointed by a political ruler deliver a verdict. Acknowledging that Weber did not see his methodological categories as being entirely rigid, it is nonetheless clear that the ordeal cannot accurately be viewed as being the epitome of formal irrationality in the way it is described in *Economy and Society*. The England problem illustrates the difficulty in applying Weber's typologies to legal phenomena which do not fit readily into one type or the other. Although Weber may not have intended his typologies to be rigid, he is in some respects hamstrung by his own typologies in attempting to interpret complex legal phenomena such as the ordeal and categorise both it and the societies and legal systems within which it operates. Instead, trial by ordeal bridges formal irrationality and substantive irrationality. In a phenomenon that is typified by its dual nature and inherent conflicts, this is entirely apposite.

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<sup>62</sup> Neil Duxbury, *Random Justice: On Lotteries and Legal Decision-Making* (OUP, 1999) 14